

MAR 13 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SANTOS EDY SOTO,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney
General,

Respondent.

No. 04-74562

Agency No. A95-447-243

MEMORANDUM^{*}

SANTOS EDY SOTO,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney
General,

Respondent.

No. 06-74887

Agency No. A95-447-243

On Petition for Review of an Order of the
Board of Immigration Appeals

^{*} This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted March 4, 2008
Pasadena, California

Before: WALLACE, GOULD, and IKUTA, Circuit Judges.

In this consolidated case, we consider two petitions for review of BIA orders. Regarding the first petition (Case No. 04-74562), we conclude that substantial evidence supported the IJ's determination that Soto's voluntary departure in 1995 interrupted his period of continuous physical presence for purposes of his application for cancellation of removal. *See* 8 U.S.C.

§ 1229b(b)(1)(A); *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 971 (9th Cir. 2003).

Ibarra-Flores v. Gonzales, 439 F.3d 614 (9th Cir. 2006) does not alter our analysis. Unlike the petitioner in that case, Soto unambiguously testified that he was arrested in the United States in 1995 and that he accepted voluntary departure. *See Id.* at 618–19. Soto's testimony is substantial evidence that he knew he was subject to deportation and that he agreed to return to Mexico voluntarily. *See Id.* at 619–20.

Soto relies on *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 980–82 (9th Cir. 2006) in support of his contention that the BIA erred in reducing his voluntary

departure period from 60 to 30 days.¹ *Padilla-Padilla* was decided after the BIA considered Soto's appeal in this case. Therefore, we grant Soto's petition in part and remand to the BIA so that it may consider this issue in the first instance. *See INS v. Ventura*, 537 U.S. 12, 16–18 (2002).

Regarding the second petition (Case No. 06-74887), we conclude that the BIA did not abuse its discretion in denying Soto's untimely motion to reopen. *See* 8 C.F.R. § 1003.2(c)(2). Soto's motion to reopen was untimely because it was filed more than ninety days after the BIA's final disposition of his removal proceeding on August 12, 2004. *See id.*

Soto's contentions that the ninety day period should have been tolled are unavailing. First, a change in the law is not a basis for filing a motion to reopen,

¹Soto did not raise this argument in his opening brief for Case No. 04-74562. We would ordinarily consider this issue waived, *see Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 858 n.4 (9th Cir. 1999), but an exception to the waiver rule is applicable in this case. *See United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992) (holding that the court may excuse waiver where failure to raise an issue did not prejudice the opposing party); *see also United States v. Gamma Tech Indus., Inc.*, 265 F.3d 917, 929–30 (9th Cir. 2001) (reaching an issue raised for the first time in oral argument because both parties had an opportunity to discuss and brief it, and “its omission from the opening briefs has prejudiced no one.”). Soto briefed the voluntary departure issue, and the government responded, in consolidated Case No. 06-74887. Moreover, the government had an opportunity to address this issue at oral argument, *see Ibarra-Flores*, 439 F.3d at 619 n.4, and it took the position that Soto had not waived the issue. Therefore, our consideration of the issue will not “prejudice the defense of the opposing party.” *Ullah*, 976 F.2d at 514.

let alone an untimely motion to reopen. *See* 8 C.F.R. § 1003.2(c)(1); *Iturribarria v. INS*, 321 F.3d 889, 895–96 (9th Cir. 2003). Second, Soto’s filing deadline was not subject to equitable tolling because Soto did not introduce any new facts as part of his motion to reopen. *See Membreno v. Gonzales*, 425 F.3d 1227, 1229–30 (9th Cir. 2005) (en banc); *Socop-Gonzales v. INS*, 272 F.3d 1176, 1187–89 (9th Cir. 2001) (en banc). Third, the fact that Soto timely filed a petition for review in Case No. 04-74562 does not toll the limitations period for his motion to reopen. *See* 8 C.F.R. § 1003.2(c)(3); *Caruncho v. INS*, 68 F.3d 356, 360 (9th Cir. 1995). Finally, this court does not have jurisdiction to address the argument that the BIA should have exercised its discretion to reopen Soto’s case sua sponte. *See Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002).

Petition in Case No. 04-74562 is Granted in Part, Denied in Part, and Remanded.

Petition in Case No. 06-74887 is Denied in Part and Dismissed in Part.

Judge WALLACE concurs except he would enforce the waiver and not remand Case No. 04-74562.